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No. 91-1920

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In The

Supreme Court of the United States

October Term, 1992

CLAUDE T. WEIMER, For Himself; and
ASSOICIATION OF COMMONWEALTH CLAIMANTS,
An Unincorporated Association,

Petitioners,

vs.

PAUL AMEN; S.E. COPPLE; MARVIN COPPLE; COMMERCE SAVINGS COLUMBUS, INC.; FIRST SAVINGS CO.; FIRST NATIONAL BANK; NORWEST CORP.; COMMERCE GROUP, INC.; COMMERCE SAVINGS LINCOLN, INC.; PROVIDENT FEDERAL SAVINGS BANK; UNION BANK & TRUST CO.; AMERICAN STATE SAVINGS COMPANY; FEDERAL DEPOSIT INSURANCE CORPORATION; AMERICAN SECURITY BANK; COMMERCE SAVINGS SCOTTSBLUFF, INC.; KEN WELLMAN; WILLIAM BECKMAN; DOUGLAS ALFORD; ALFRED ADAMS; KENLON H. HAKE; ROY ASHCRAFT; DARREL ANDERSON; TIM SPOENEMAN; DENIS APPELBEE; and HERBERT HEUMANN,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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RULES:

Rule 17(a), Federal Rules of Civil Procedure 6, 8

STATUTES:

18 U.S.C. § 1964(c) 3

INTRODUCTION

The respondents, in their Brief at page 1, characterize the questions presented for review as follows:

> "1. Whether alleged RICO violations in administering a state-chartered deposit insurance corporation *proximately caused losses to creditors of an insured bank which occurred when the bank failed.* (Emphasis supplied)
>
> 2. Whether it was an abuse of discretion to dismiss an amended complaint for failure to state a claim without granting a post-dismissal request for leave to amend."

The Respondents' first Question Presented for Review concerns the issue of proximate cause, which was NOT addressed by the district court or by the court of appeals. Nevertheless, Respondents now assert that the decisions of the district court and the court of appeals to dismiss ACC's complaint should not be disturbed, on the ground that ACC's injuries were not proximately caused by the wrongful acts of the Respondents, as required by this Court's opinion in *Holmes vs. SIPC*, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). This argument of the Respondents is misplaced, as discussed in the REPLY, below.

The Respondents' second "Question Presented For Review" quoted above, is not within the scope of the Petition for Writ of Certiorari.

The Petitioner, ASSOCIATION OF COMMONWEALTH CLAIMANTS (ACC), did file a post-dismissal Motion for Relief From Judgment (Petitioner's Appendix M-1). This Motion for Relief From Judgment was denied by the district court on the ground that jurisdiction of the

case "still resides with the Court of Appeals." (Petitioner's Appendix 0-1). In the extraordinary procedural context of this action, the district court's ruling in this regard was purely jurisdictional and not discretionary, and was probably correct. ACC *does not ask* this Court to review the district court's jurisdictional ruling set forth at Petitioner's Appendix 0-1. Instead, ACC asks this Court to grant certiorari in part because the district court's order of dismissal (Petitioner's Appendix F-1), was entered without first providing ACC an opportunity to join or seek ratification from the entity found by the district court to be the real party in interest as required by Rule 17(a), Federal Rules of Civil Procedure. In addition, ACC has raised the question whether the district court should have made its order of dismissal (Petitioner's appendix F-1) subject to amendment by ACC to show that prerequisites for a derivative action had been met. Neither of these questions involves the district court's denial of ACC's post-dismissal Motion for Relief from Judgment (Petitioner's Appendix M-1).

PETITIONER'S ARGUMENT IN REPLY TO RESPONDENTS' BRIEF

Although ACC does not wish to belabor a precedent so fresh as the opinion in *Holmes vs. SIPC, supra,* a brief review of that case will serve to demonstrate that the *Holmes* opinion supports ACC's Petition for Certiorari.

In *Holmes,* it was alleged that the defendants manipulated sales of securities in violation of the RICO Act, and that the alleged manipulation of securities brought about the insolvency of two securities broker-dealers, First State

Securities Corporation (FSSC), and Joseph Sebag, Inc. (Sebag), As a consequence of these insolvencies, the Securities Investor Protection Corp. (SIPC) was required to pay to the trustees for FSSC and Sebag up to $500,000.00 to secure accounts of each customer of the broker-dealers who had purchased manipulated securities, and up to $100,000.00 to secure accounts of each customer of the broker-dealers who had not purchased manipulated securities. SIPC then claimed it was subrogated to the rights of FSSC and Sebag customers to bring suit for the RICO Act violations that had caused the losses to customer accounts.[1]

This Court ruled that §1964(c) of the RICO Acts calls for application of common law notions of proximate cause. Under this analysis, SIPC could not sue for losses to the accounts of customers who had not purchased manipulated securities. This was because the only harm suffered by *non-purchasers* was loss caused by the insolvency of FSSC and Sebag, which insolvency was in turn allegedly caused by RICO violations. This court ruled that the harm to non-purchasers was too remote from the RICO violations and therefore not proximately caused by the violations.

The Court also noted three points that are of great importance in connection with ACC's Petition for Certiorari, as follows:

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[1] SIPC sued only on the accounts of customers who had NOT purchased manipulated securities. Those customers whose losses flowed from the actual purchase of manipulated securities had filed their own RICO actions.

1. The right of the trustees for FSSC and Sebag to sue under RICO was not questioned (*Holmes vs. SIPC, supra,* FN8);

2. The right of purchasers of manipulated securities to sue under RICO was not questioned (*Holmes vs. SIPC, supra,* FN 18, 19); and

3. Even without purchasing manipulated securities, broker-dealer customers might be proximately injured by the RICO violations if the RICO violations delayed the declaration of insolvency of the broker-dealers, and thereby increased the losses of the broker-dealer customers.

As to the third point concerning delay in the discovery of the broker-dealer's insolvency, Justice Souter's opinion states the following in Footnote 19:

> "We further note that SIPC alleged . . . that . . . Joseph Lugo, an officer of FSSC and one of the alleged conspirators, parked manipulated stocks in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. . . . Lugo "sold" securities owned by FSSC to customers at market price, and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker-dealer must discount the stock it holds in its own account . . . and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC allegedly would have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. . . . Thus, their customers

> would have been injured to a lesser extent. . . . *We do not rule out that, if by engaging in the parking transaction, the conspirators committed* [RICO racketeering offenses], *the broker-dealers' customers might be proximately injured by these offenses.* See e.g., *Taffet vs. Southern Co.*, 930 F.2d 847, 856-857 (CA 11, 1991); *County of Suffolk vs. Long Island Lighting Co.*, 907 F.2d 1295, 1311-1312 (CA 2, 1990) . . . " (Emphasis Supplied).

The position of ACC's assignors (depositors and other creditors of Commonwealth Savings Company) is analogous to that of the broker-dealers' customers in *Holmes*. Likewise, Commonwealth Savings Company is in the position of the insolvent broker-dealer in *Holmes*, and Commonwealth Savings Company's Receiver is analogous to the trustees of the insolvent broker-dealers.

ACC's complaint alleges that RICO racketeering offenses of the Respondents caused the following:

1. Direct injury to depositors by concealing the financial instability of a bank, thus inducing persons to make and retain deposits in the bank;

2. Direct injury to depositors by concealing the inadequacy of deposit guaranties, also inducing them to make and retain deposits in an unstable bank;

3. Direct injury to depositors and general creditors of Commonwealth Savings Company by delaying the inevitable demise of Commonwealth Savings Company, and thus increasing the losses of depositors and creditors.

Commonwealth Savings Company depositors who were induced by fraudulent misrepresentations to make and retain deposits in Commonwealth Savings Company are like the customers of FSSC and Sebag in *Holmes vs. SIPC, supra,* who purchased securities and thus, presumably had a right to sue under RICO. Commonwealth Savings Company creditors and depositors who suffered increased losses because RICO violations delayed the closure of Commonwealth Savings Company are like customers of FSSC and Sebag, whose losses were increased because sham "parking" transactions forestalled regulatory closure of the broker-dealers.

Commonwealth Savings Company's Receiver is like the trustees appointed for the insolvent broker-dealers in *Holmes,* who presumably had rights to sue under RICO for direct injuries to their insolvent principals.

If ACC's claims are truly derived from Commonwealth Savings Company as claimed by Respondents, then Commonwealth's Receiver, like the broker-dealers' trustees in *Holmes,* had a claim under the proximate cause analysis of *Holmes,* and ACC should have been allowed to join the Receiver or seek his ratification under Rule 17(a), Federal Rules of Civil Procedure.[2]

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[2] Respondents represent in footnote 40, page 17, of their Brief, that the Nebraska Supreme Court "characterized ACC's claims as relatively worthless", citing *Hamann vs. Marsh,* 237 Neb. 699, 720, 467 N.W.2d 836, 851 (1991). This is a gross misrepresentation of the Nebraska Supreme Court's opinion. In *Hamann,* the court was discussing the constitutionality of a legislative enactment that would have provided state funds to reimburse Commonwealth Savings Company depositors up to

Quite unlike this Court's opinion in *Holmes*, the district court opinion in the case *sub judice* relied upon a particular body of circuit court precedent holding that the RICO Act, like the Clayton Act, allows recovery only to those "directly injured" by prohibited activity. The district court then found injuries to ACC's assignors to be indirect, on the questionable ground that "wrongs committed by a bank's officers and directors that injure all depositors alike create a liability which is an asset of the bank itself." (Petitioner's Appendix G-4).[3]

However, the opinion of this court in *Holmes*, teaches that the courts should depart from mechanistic tests such as the "direct injury vs. indirect injury" analysis used by the district court and the court of appeals to categorize

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$30,000.00 per account as had been ostensibly guarantied by Nebraska Depository Insurance Guaranty Corporation.

This enactment contravened a Nebraska constitutional prohibition against giving or loaning the state's credit to a closed class of citizens, unless the state would receive actual consideration for payments to depositors by statutory assignment of depositors' causes of action.

The Court stated the following:

> "The state could never come close to receiving an equal amount to the proposed distribution of funds by acquiring legal claims against industrial companies [banks] that had gone bankrupt or were in receivership."

It was these potential claims against the insolvent Commonwealth that the Court characterized as "relatively worthless", and NOT the claims ACC asserts against the Respondents.

[3] Acc's Complaint is not limited to allegations of "wrongs committed by bank officers and directors." This questionable analysis is addressed in ACC's Petition for Writ of Certiorari at pp. 4-12.

ACC's complaint. Instead, a RICO complaint should be considered in light of principles of proximate causation.[4]

If the lower courts had applied the proximate cause analysis required by *Holmes vs. SIPC, supra,* rather than the mechanical "direct injury vs. indirect injury" analysis discredited by *Holmes,* the outcome necessarily would have been different. Instead, the district court and the court of appeals have rendered decisions in conflict with *Holmes vs. SIPC, supra.*

CONCLUSION

The Respondents failed to address the requirements of Rule 17(a), Federal Rules of Civil Procedure, and apparently concede this issue. In addition, the lower court opinions contravene the opinion of this Court in *Holmes vs. SIPC, supra.* Accordingly a writ of certiorari should be granted.

Respectfully submitted,

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[4] This Court in *Holmes,* specifically declined to resolve a conflict in the circuit courts about the question whether RICO Act relief for securities fraud is limited to plaintiffs who have purchased or sold a security. "A review of the conflicting cases shows that all could have been resolved on proximate causation grounds. . . . " *Holmes, supra,* 112 S.Ct. at 1322.